Cheng Yew Hooi v Perbadanan Bekalan Air Pulau Pinang Sdn Bhd

HIGH COURT (PENANG) — CIVIL APPEAL NO 12B-47–07 OF 2015
COLLIN SEQUERAH JC
10 JANUARY 2017

Damages — Quantum — Appeal against quantum — Whether appealable error in sessions court judge ('SCJ') decision — Whether nursing care should be awarded regardless of appellant having available help — Whether loss of earnings considered by SCJ — Whether SCJ justified in finding loss of earnings not proven — Whether loss of earnings proven

Tort — Negligence — Road accident — Whether maintenance of road under care and control of respondent — Whether respondent responsible for leaking pipe — Whether pothole caused by leaking pipe — Whether proven on balance of probabilities

This was an appeal against the decision of the sessions court. The appellant was riding pillion on motorcycle registration No PHH 1146, driven by one Bu Chen Au when the said motorcycle fell into a pothole along Jalan Sungai Rambai ('the road'). As a result of the accident, the appellant sustained injuries and suffered losses. The appellant contended that a burst pipe was the cause of the pothole. The sessions court dismissed the appellant's claim and found the respondent not liable to the appellant and provisionally assessed the quantum. The appellant submitted that: (a) the respondent was liable for the accident as they were the contractors solely responsible for the repair of the broken pipe at the time of the accident; (b) quantum of damages in respect of nursing care should to be allowed irrespective of the fact there was help from family members; and (c) although evidence was led, the sessions court judge failed to address the issue of loss of future earnings.

Held, dismissing the appellant's appeal against liability with costs; and dismissing the appellant's appeal in respect of quantum save in respect of the item relating to nursing care:

(1) The appellant failed to prove on a balance of probabilities that the respondent was responsible for the maintenance of the road at the material time. The district engineer had admitted that as at the time he testified, the road remained under the maintenance of MMC-Gamuda

Joint Venture Sdn Bhd. The appellant also failed to prove on a balance of probabilities that the leaking pipe was the cause of the pothole (see paras 22 & 24–25).

(2) The claim for loss of earnings was considered by the sessions court judge ('SCJ') under item (h) in the statement of claim under the particulars of special damages. It was erroneous to say therefore that the issue of loss of earnings was not considered by the learned SCJ. As argued by the respondent, the maker of the payslip was not called and the payslip remained as an 'ID' document. Thus, the said payslip could not be considered by the court. There was also doubt raised as to who paid the appellant's salary. The amount shown in the EPF statement had also differed from the amount shown in the payslip. Based on the evidence, the learned SCJ was justified in coming to her finding that the appellant had failed to prove loss of earnings (see paras 28–30).

(3) Based on the authorities adduced by the appellant, nursing care or its equivalent can be awarded notwithstanding that there was evidence that family members of the appellant were available at hand to attend and care for him. The court therefore allowed the appellant's appeal in respect of the award of nursing care for the sum of RM12,000 at RM1,000 per month (see paras 32–33).

[Bahasa Malaysia summary

Ini adalah rayuan terhadap keputusan mahkamah sesyen. Perayu adalah pembonceng motorsikal yang bernombor pendaftaran No PHH 1146, yang ditunggang oleh seorang yang bernama Bu Chen Au apabila motorsikal terjatuh dalam lubang di Jalan Sungai Rambai ('jalan tersebut'). Akibat kemalangan tersebut, perayu mendapat kecederaan dan mengalami kerugian. Perayu berhujah bahawa paip bocor tersebut yang menyebabkan lubang di jalan. Mahkamah sesyen menolak tuntutan perayu dan mendapati responden tidak bertanggungjawab kepada perayu dan menilai kuantum secara sementara. Perayu berhujah bahawa: (a) responden bertanggungjawab untuk kemalangan tersebut kerana mereka adalah satu-satunya kontraktor yang bertanggungjawab bagi pembaikan paip bocor pada masa kemalangan tersebut; (b) kuantum ganti rugi berkaitan penjagaan patut dibenarkan tanpa mengira fakta terdapat bantuan daripada ahli keluarga; dan (c) walaupun keterangan dikemukakan, hakim mahkamah sesyen gagal untuk mempertimbangkan isu kerugian pendapatan masa hadapan.

Diputuskan, menolak rayuan perayu terhadap liabiliti dengan kos; dan menolak rayuan perayu berkaitan kuantum kecuali berkenaan perkara yang berkaitan penjagaan:

(1) Perayu gagal untuk membuktikan atas imbangan kebarangkalian bahawa responden adalah bertanggungjawab bagi penyelenggaraan jalan tersebut

pada masa itu. Jurutera daerah telah mengaku bahawa pada masa dia memberi keterangan, jalan tersebut kekal di bawah penyelenggaraan MMC-Gamuda Joint Venture Sdn Bhd. Perayu juga gagal untuk membuktikan atas imbangan kebarangkalian bahawa paip bocor tersebut yang menyebabkan lubang di jalan tersebut (lihat perenggan 22 & 24–25).

(2) Tuntutan untuk keruagian pendapatan dipertimbangkan oleh hakim mahkamah sesyen ('HMS') di bawah perkara (h) di dalam pernyataan tuntutan di bawah butir-butir ganti rugi khas. Ia adalah salah untuk menyatakan oleh itu bahawa isu kerugian pendapatan tidak dipertimbangkan oleh HMS yang bijaksana. Seperti yang dihujahkan oleh responden, pembuat slip gaji tidak dipanggil dan slip gaji tersebut kekal sebagai dokumen 'ID'. Oleh itu, slip gaji tersebut tidak boleh dipertimbangkan oleh mahkamah. Juga terdapat keraguan dibangkitkan terhadap siapa yang membayar gaji perayu. Jumlah yang ditunjukkan di dalam pernyataan KWSP juga berbeza daripada jumlah yang ditunjukkan di dalam slip gaji. Berdasarkan keterangan, HMS berjustifikasi dalam mencapai dapatannya bahawa perayu telah gagal untuk membuktikan kerugian pendapatan (lihat perenggan 28–30).

(3) Berdasarkan autoriti yang dikemukakan oleh perayu, penjagaan atau bersamaannya boleh diawardkan walaupun terdapat keterangan bahawa ahli keluarga perayu boleh menguruskan dan menjaganya. Mahkamah oleh itu membenarkan rayuan perayu berkaitan award penjagaan untuk sejumlah RM12,000 pada RM1,000 setiap sebulan (lihat perenggan 32–33).]

Notes

For cases on quantum in general, see 6(1) *Mallal's Digest* (5th Ed, 2015) paras 1061–2089.

For cases on road accident, see 12(1) *Mallal's Digest* (5th Ed, 2015) paras 1790–2092.

Cases referred to

Marappan & Anor v Siti Rahmah bte Ibrahim [1990] 1 MLJ 99, SC (refd)
Taylor v Bristol Omnibus Co Ltd and another [1975] 2 All ER 1107, CA (refd)

A Tanasekharan (A Tanasekharan & Assoc) for the appellant.
Noor Akliza bt Ahmad (Noor Asyimah & Assoc) for the respondent.

Collin Sequerah JC:

INTRODUCTION

[1] This appeal arose out of the decision of the Butterworth Sessions Court on 9 July 2015 in respect of a road accident suffered by the appellant who was the plaintiff at the sessions court. The respondent was the third defendant at the sessions court. For convenience, the parties will be referred to by their respective designation at the sessions court.

[2] The plaintiff's claim against the second defendant at the sessions court was struck out by the sessions court on 27 September 2012 while the claim against the first defendant was struck out on 27 September 2013. The full trial conducted at the sessions court was therefore only in respect of the plaintiff's claim against the third defendant.

[3] On 9 July 2015, the sessions court found that the third defendant was not liable to the plaintiff and dismissed the claim by the plaintiff. The sessions court also provisionally assessed the quantum.

[4] The plaintiff, being aggrieved by the decision has appealed to this court.

PERTINENT FACTS

[5] The pertinent facts leading to the plaintiff's claim is as follows. On 4 March 2011, at around 11.45pm the plaintiff was a pillion on motorcycle registration No PHH 1146 ridden by one Bu Chen Au when the said motorcycle fell into a pothole in the road at Jalan Sungai Rambai. As a result of the accident, the plaintiff sustained injuries and losses.

[6] It was contended that a burst pipe had caused the pothole.

[7] It was also alleged that the said pothole was caused by the negligence of the defendants' and that the third defendant was the contractor solely responsible for the repair of the broken pipe.

SUBMISSIONS OF PARTIES

The plaintiff/appellant

[8] The plaintiff contended that it was the third defendant that had the sole authority to carry out repairs of broken pipes and that this authority had not been delegated to any other party.

[9] The plaintiff submitted that the third defendant had repaired the burst pipe and resurfaced the road on 5 March 2011. They said that the pothole was caused by a broken pipe and they referred to evidence that there were around 35–40 pipes broken daily in the Seberang Perai Tengah area.

[10] It was further submitted that the safety and health officer of the second defendant had given evidence that their works are confined to the railway tracks and that as the construction of the road over the bridge has yet to begin, their lorries do not use Jalan Sungai Rambai. It was submitted that the third defendant's attempt to fault the second defendant for the occurrence of the accident was therefore unjustified.

[11] The plaintiff said that the learned sessions court judge ('the SCJ') was wrong in assuming that since no work was carried out by the third defendant, it was therefore not responsible for the broken pipe. The SCJ had also erred in failing to consider that the hole was covered with water and therefore was unable to be noticed by road users at night. The SCJ, it was also contended had erred in finding that there was enough space for a motorcycle to pass through as this was based upon the assumption that the rider knew about the existence of the hole in the road.

[12] The third defendant therefore having chosen to lay pipes under the road must accept responsibility for the burst pipe.

[13] In respect of quantum, the plaintiff appealed in respect of two items, namely, nursing care and loss of future earnings. With respect to nursing care, it was submitted that the SCJ had erred in finding that since there were members of the family that could take care of the plaintiff, no award could to be made for nursing care. It was submitted that nursing care ought to be allowed irrespective of the fact that there was help available from members of the family.

[14] In respect of loss of future earnings, it was submitted that although evidence was led, the SCJ had failed to address this issue.

The third defendant/respondent

[15] The third defendant in reply submitted that there was a difference between a burst and a leaking pipe. They submitted that only a burst pipe could cause such a wide hole in the road to materialise. They submitted that in this case the pipes had only sprung a leak and that the leaking pipe was repaired on time. It was submitted that a leaking pipe would only cause a hole measuring six inches if not repaired within the prescribed time. This was not the case here.

[16] The hole in this case measured approximately one foot. Evidence was led that a leaking pipe would not cause a hole measuring one foot wide to materialise.

[17] The third defendant also submitted that evidence was led that the second defendant was appointed by the Ministry of Transport as the contractor for the construction of the electrified double track in that area. It was they therefore who were responsible for the maintenance of the said road, namely, Jalan Sungai Rambai.

[18] Despite this no action was taken when the accident occurred nor did they report the leaking pipe to the third defendant. The third defendant submitted that they had repaired the pipe within the prescribed time. It was contended that the wrong party had been impleaded.

[19] In respect of quantum, it was submitted that as the plaintiff had a mother and siblings who could take care of him, the SCJ had rightfully dismissed the claim for nursing care.

[20] In respect of loss of earnings, it was submitted inter alia that such damages must be specifically and strictly proven. The plaintiff had failed in this endeavour when they called the wrong witnesses in support. There were discrepancies as to who had issued the plaintiff's payslip as well as discrepancies between the payslip and the EPF statement. Further, the payslip had not been properly proved in evidence.

ANALYSIS AND DECISION

Liability

[21] After hearing submission of parties, and perusing the evidence adduced during the trial at the sessions court, the sole issue to be determined in respect of liability is whether the third defendant was liable for the said accident involving the plaintiff who sustained injuries and losses by falling into the pothole on the road at Jalan Sungai Rambai on 4 March 2011 at around 11.45pm. This involves the question of whether the said road was under the care and control of the third defendant at the material time.

[22] A related issue is whether the pothole in the road was caused by a burst or leaking pipe. After perusing the evidence adduced at the sessions court, I found the following facts had emerged:

(a) SD3, the district engineer, alluded to a letter dated 30 April 2012 from Jabatan Kerja Raya ('JKR') Seberang Perai Tengah prepared by the

previous district engineer. That letter confirmed that the Ministry of Transport ('MOT') had appointed MMC-Gamuda Joint Venture Sdn Bhd ('the second defendant') as the contractor for the construction of the electrified double track and that they were responsible for all matters regarding traffic and maintenance of Jalan Sungai Rambai.

SD3 further admitted that as at the time he testified, the said road remained under the maintenance of MMC–Gamuda Joint Venture Sdn Bhd ('the second defendant');

(b) the pipe was a leaking pipe as testified to by SD1. His evidence was that there was a hole approximately one foot wide and smaller holes. He said that the pipes were embedded in the tar road at Jalan Sungai Rambai at a depth of three feet.

The damaged pipe had sprung a leak the size of 20mm. According to him a leak in the pipe the size of 20mm and embedded three feet below the road surface will only cause a hole six inches wide if not repaired immediately. This evidence was not subject to challenge; and

(c) SD2 testified that the leaking pipe was repaired within the prescribed time.

[23] The above evidence were findings of fact made by the learned sessions court judge ('the SCJ'). These should not be disturbed save for good reasons. No such reasons exist here.

[24] From the evidence, I find that the plaintiff had failed to prove on a balance of probabilities that the leaking pipe was the cause of the pot hole the width of one foot. In this regard, I tended to agree with the submission of learned counsel for the third defendant that there was a difference between a leaking pipe and a burst pipe. In this case, the evidence showed that it was the former.

[25] I also find that the plaintiff had failed to prove on a balance of probabilities that the third defendant was responsible for the maintenance of the road at Jalan Sungai Rambai at the material time.

[26] I therefore found no appealable error on the part of the SCJ and accordingly dismissed the plaintiff's appeal against liability with costs.

Quantum

[27] The SCJ had considered the issue of loss of earnings in her grounds of judgment at pp 6–7 of the *rekod rayuan tambahan*. She came to the finding that because items (a)–(l) excluding (b) and (d) in the particulars of special damages

in the statement of claim were not agreed, it was for the plaintiff to adduce sufficient proof. She had however refused the claims including that for loss of earnings for want of proof on the plaintiff's part.

[28] It was erroneous to say therefore that the issue of loss of earnings was not considered by the learned SCJ. The claim for loss of earnings was considered by the SCJ under item (h) in the statement of claim under the particulars of special damages.

[29] Although the plaintiff's Employees Provident Fund ('EPF') slip was tendered and marked in evidence, the solicitor for the third defendant had objected to the payslip of the plaintiff as the maker of the document was not called and the payslip remained as an 'ID' document. The said payslip thus could not be considered or taken into account by the court.

[30] There was also doubt raised during the trial as to who had paid the plaintiff's salary. The amount shown in the EPF statement had also differed from the amount shown in the payslip. On the available evidence, the learned SCJ was justified in coming to her finding that the plaintiff had failed to prove loss of earnings.

[31] The learned SCJ had considered the issue of nursing care under item (m) and found that there was evidence that there was enough available assistance on hand to help the plaintiff and she therefore disallowed the claim for nursing care.

[32] The plaintiff had however produced authorities that confirm that nursing care or its equivalent can be awarded notwithstanding that there is evidence that family members of the plaintiff were available at hand to attend and to care for him. See *Taylor v Bristol Omnibus Co Ltd and another* [1975] 2 All ER 1107 and *Marappan & Anor v Siti Rahmah bte Ibrahim* [1990] 1 MLJ 99.

[33] I therefore allowed the plaintiff's appeal in respect of the award of nursing care for the sum of RM12,000 at RM1,000 per month.

[34] Under all the circumstances therefore, I found no appealable error in the SCJ's decision in respect of quantum except in respect of nursing care. In the premises I also dismissed the plaintiff's appeal in respect of quantum save in respect of the item relating to nursing care.

Appeal against liability dismissed with costs and appeal against quantum dismissed save in respect of item relating to nursing care.

Reported by Nisha Paran